NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANNIE BOWSER, *et al.*	:	
Plaintiffs,	:	Civ. No. 03-2690 (GEB)
v.	:	
NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY	:	**MEMORANDUM OPINION**
Defendant.	:	

BROWN, District Judge

This matter comes before the Court upon Defendant's motion for summary judgment and Plaintiffs' appeal of Magistrate Judge Hughes' June 22, 2004 Discovery Order. Oral argument was heard on October 4, 2004. For the reasons set forth below, Defendant's motion for summary judgment is denied and the ruling of the Magistrate Judge is affirmed.

I. BACKGROUND

Plaintiffs Annie Bowser ("Bowser"), Vincent DaSilva ("DaSilva"), Joseph Petrino ("Petrino"), Audrey Savas ("Savas"), Cheryl Ali ("Ali"), and Herbert Korte ("Korte") (collectively referred to as "Plaintiffs") commenced this action against Defendant New Jersey Housing and Mortgage Finance Agency's ("NJHMFA" or "the Agency") on June 5, 2003. NJHMFA is an entity "affiliated with, but not part of, the New Jersey Department of Community Affairs." Am. Compl. ¶ 1. NJHMFA is involved with the creation and implementation of housing programs in the State

of New Jersey.

Plaintiffs are former at-will employees of NJHMFA. Def.'s Statement of Undisputed Facts ¶ 1 ("Def.'s Statement"). These six Plaintiffs were among twenty-six employees of the NJHMFA that were terminated in May and July of 2002.[1] Am. Compl. ¶¶ 7,8; Def.'s Statement ¶ 2. Defendant asserts that their terminations were the result of an Agency-wide reorganization. Def.'s Statement ¶ 2. Plaintiffs allege that they were wrongfully discharged based on their actual or perceived affiliation with the Republican Party. Plaintiffs claim that such termination violated their constitutional right to free speech and political association as guaranteed by the First and Fourteenth Amendments of the United States Constitution.[2]

In January of 2002, James E. McGreevey assumed office as the Governor of New Jersey. Shortly thereafter, Susan Bass Levin ("Levin") was appointed by McGreevey as Commissioner of the Department of Community Affairs ("DCA"). Both McGreevey and Levin belong to the Democratic Party. Pls.' Counter Statement of Facts ¶¶ 1, 2 ("Pls.' Statement"). In her capacity as Commissioner, Levin also assumed the position of Chairperson on the NJHMFA's Board. As Chairperson, Levin has the responsibility of ensuring "that the Agency produces as much affordable

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[1] The exact number of terminations resulting from the reorganization appears to be disputed. Defendant identifies twenty-eight terminated employees. Calao Cert., Ex. DD, Def.'s Answer to Interrog. 7. Plaintiffs respond that one employee, Charles Bussey, was actually hired rather than fired. Pls.' Statement, n.1. Further, Plaintiffs state that another employee, Tony Tozzi, retired from his position. *Id.* For purposes of this motion, we will refer to the number of terminated employees as twenty-six.

[2] Plaintiffs filed an Amended Complaint on January 8, 2004 which added a second claim against NJHMFA alleging that their actions violated the New Jersey Veterans' Tenure Act. N.J. STAT. ANN. 38:16-1, *et seq*. On March 8, 2004, this Court dismissed the claim based on Federal Rule of Civil Procedure 12(b)(6). The only remaining claim is Count I of the Amended Complaint which alleges constitutional violations pursuant to 42 U.S.C. § 1983.

housing as possible for New Jersey families and seniors." Certification of Calao in Supp. of Mot. for Summ. J., Ex. C at 10 ("Calao Cert."). Notably, Levin also has the final say with regard to hiring decisions at NJHMFA. Sweetser Cert., Ex. P at 12-13.

Upon assuming the role of Commissioner, Levin asserts that she set an immediate goal of fulfilling the mission of NJHMFA – to provide affordable housing to the citizens of New Jersey. Calao Cert., Ex. C at 15. Levin engaged in an information gathering process to determine ways in which the Agency could run more efficiently. *Id.* at 21. She spoke with members of the housing industry, including developers and contractors, as well as former executives of the NJHMFA to evaluate the Agency's strengths and weaknesses. Levin also attended Board meetings and was briefed by staff members. *Id.* Levin consulted Former Executive Director for the NJHMFA, Deborah DeSantis, about "the overall functioning of the agency as it pertained to the structure." Calao Cert., Ex. D at 28. During this process, Levin received information relating to the performance of various employees at NJHMFA. Levin generally did not record the information she gathered, but kept it "in [her] head." Calao Cert., Ex. C at 24.

Based on the information Commissioner Levin acquired from her discussions with various individuals, Levin created a list of NJHMFA employees whom she intended to terminate. Def.'s Statement ¶ 11. Levin consulted former Executive Director C. Sean Closkey ("Closkey"), Chief of Programs Tracee Battis ("Battis"), and Chief Financial Officer Eileen Hawes ("Hawes") before terminating any employees. Def.'s Statement ¶ 12. Based on recommendations from Battis, Levin removed three employees from the list that Battis believed were excellent performers. Ultimately, twenty-six employees were terminated, and nineteen additional employees were invited to participate in NJHMFA's "early retirement pension program" by July of 2002. Def.'s Statement ¶ 14.

Defendant alleges that in addition to the general restructuring of the NJHMFA, performance, conduct and attitude were also taken into consideration when deciding these terminations. Certification of Sweetser, Ex. A, at 9 ("Sweetser Cert."). Further, a total of at least fourteen positions were eliminated from the Agency in 2002. *Id.* at 10.

Plaintiffs were among those terminated from NJHFMA. Bowser and Savas were employed in the Human Resources ("HR") Department. Bowser was employed at the Agency for thirty-four years. Pls.' Statement ¶ 8. She held the title of HR Manager, but was temporarily assigned the position of HR Information Systems ("HRIS") Project Manager at the time of the termination. Calao Cert., Ex. H, 59-61. Savas was employed at the Agency for six years and held the position of Director of HR at the time of termination. Pls.' Statement ¶ 12. HR was designated as one of the departments to be restructured as part of the reorganization. Defendant asserts that Levin conducted an extensive analysis of the department and concluded that HR was disproportionately overstaffed. Def.'s Statement ¶ 29. After the reorganization, the HR department decreased in size by half. Bowser and Savas' positions were eliminated as a result of the reorganization. Sweetser Cert, Ex. A at 8-9.

Similarly, the Multi-Family Programs Department was designated as a unit that required restructuring. Korte and DaSilva were members of this department. Korte was employed at the Agency for seven years and held the position of Loan Coordinator. Pls.' Statement ¶ 10. DaSilva worked at NJHMFA for eight years and held the position of Administrator of Regional Contribution Agreements. *Id.* ¶ 9. Prior to the terminations, Levin and Closkey received information that the Multi-Family Program Department was "completely ineffective and problematic." Def.'s Statement ¶ 24. Defendant maintains that Korte and DaSilva's positions were eliminated to better the

efficiency of that department.

Petrino served as the Chief Information Officer of NJHMFA. He was employed at the Agency for eighteen months. Pls.' Statement ¶ 11. The Information Technology Department was likewise designated as a unit that needed restructuring. Petrino's position of Chief Information Officer was eliminated. Ali was a member of the Government Affairs and Community Outreach Department. Ali was employed at the Agency for nine years and held the position of Outreach Coordinator III. *Id.* ¶ 7. This position was eliminated as part of the reorganization. Sweetser Cert, Ex. A at 9.

Prior to the terminations in February or March of 2002, Plaintiffs assert that a list was created at the request of the Commissioner. Pls.' Statement ¶ 27. Defendants dispute the existence of such list. Def.'s Reply at 9. Bowser and Savas testified at their depositions that they were instructed to prepare a list of all employees at the Agency at Level 15 and above – essentially, managers earning over $50,000. Pls.' Statement ¶ 27. Both allege that the Chief Operating Officer at the time, Denise Coyle, instructed them to create the list at the request of Commissioner Levin. *Id.* They contend that they were told to include specific information including, among other things, the employee's political affiliation. More specifically, Plaintiffs allege that Coyle instructed them to designate whether the employees were "Ds" or "Rs," referring to Democrats or Republicans respectively. Sweetser Cert., Ex. L at 233. Coyle's testimony contradicts this assertion. Supp. Certification of Calao, Ex. 11 ("Calao Supp. Cert."). Further, Levin and the executives with whom she discussed terminations deny having seen this list. Def.'s Reply at 9.

Plaintiffs allege a second list was created which likewise contributed to the terminations. Plaintiffs assert that Coyle was instructed by Levin to compile a list of employees that were hired

between 1994 to 2002. Sweetser Cert., Ex. V at 70-71. Plaintiffs note that Republican Governors held office during this time period, namely Christine Todd Whitman and Donald DiFrancesco. Pls.' Statement ¶ 31. Of the twenty-six terminated employees, twenty-two were hired between 1994 and 2002. Sweetser Cert., Ex. DD. Plaintiffs further assert that this list, as well as the list of Level 15 Employees, were requested by the Governor's Office – namely by Michael Henneberg, employee of the Governor's Office. Pls.' Statement ¶ 35; Sweetser Cert., Ex. V at 77-80.

Ultimately, twenty-six employees were terminated and at least fourteen positions were eliminated as part of the alleged reorganization. Defendant, however, identifies ten new positions were created as a result of the reorganization. Sweetser Cert., Ex. A at 10-11. Plaintiffs further identify five additional positions that were created as well – one "Confidential Aide" position and four "Aide to Commissioner" positions. Pls.' Statement ¶ 41.

Between January 2002 and March 2003, forty new employees were hired at NJHMFA – thirty-eight being full-time employees. Pls.' Statement ¶ 50. Plaintiffs assert that twenty-five of the thirty-eight full-time employees are either affiliated with the Democratic Party or were referred by the Governor's Office. *Id.* ¶¶ 52-54. Specifically, they allege that thirteen are registered Democrats and seven were referred by members of the Democratic Party. Plaintiffs contend that at least four of the remaining new hires were referred by Democratic politicians. *Id.* ¶¶ 58-64.

NJHMFA now moves for summary judgment seeking dismissal of Count I of Plaintiffs' Amended Complaint which alleges Plaintiffs' terminations were impermissibly based on political affiliation.

II. DISCUSSION

A. Defendant's Motion for Summary Judgment

1. Summary Judgment Standard

A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219, n.3 (3d Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); *Hersh v. Allen Prod. Co.*, 789 F.2d 230, 232 (3d Cir. 1986). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (noting that no issue for trial exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict in its favor). In deciding whether triable issues of fact exist, the court must view the underlying facts and draw all reasonable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995); *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 231 (3d Cir. 1987).

Rule 56(e) of the Federal Rules of Civil Procedure provides, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56(e). The rule does not increase or decrease a party's ultimate burden of proof on a claim. Rather, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson*, 477 U.S. at 255-56.

Under the rule, a movant must be awarded summary judgment on all properly supported issues identified in its motion, except those for which the nonmoving party has provided evidence to show that a question of material fact remains. *See Celotex*, 477 U.S. at 324. Put another way, once the moving party has properly supported its showing of no triable issue of fact and of an entitlement to judgment as a matter of law, for example, with affidavits, which may be "supplemented . . . by depositions, answers to interrogatories, or further affidavits," *id.* at 322, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *see also Anderson*, 477 U.S. at 247-48 ("By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion . . . the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

What the non-moving party must do is "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit."); *Anderson*, 477 U.S. at 249; *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) ("To raise a genuine issue of material fact . . . the [non- moving party] need not match, item for item, each piece

of evidence proffered by the movant" but rather must exceed the 'mere scintilla' threshold.), *cert. denied*, 507 U.S. 912 (1993).

2. Political Discrimination Claims

The First Amendment of the United States Constitution protects the right to political association and political expression. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). The Supreme Court recognized in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), that such right prohibits government officials from discharging or terminating employees based on the employee's political affiliation. Patronage dismissals severely restrict political belief and association, which "constitute the core of those activities protected by the First Amendment." *Elrod*, 427 U.S. at 356. Such protection extends to promotions, transfers, recalls, and other hiring decisions concerning public employees. *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). The Court reasoned that the rights guaranteed by the First Amendment outweighs the government's interest in maintaining political patronage within a system. Additionally, the Court noted that "the free functioning of the electoral process also suffers" as a result of political patronage by preventing support of competing political interests. *Elrod*, 427 U.S. at 356.

The Court recognized, however, that patronage dismissals may be appropriate with regard to policymaking positions in order to ensure that policies sanctioned by the electorate are implemented. *Elrod*, 427 U.S. at 367-68. Recognizing that no clear line exists between a policymaking position and a non-policymaking position, the Court stated that one must consider whether the employee "acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 368. The Court articulated in *Branti* that the ultimate "question is whether the hiring authority

can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. Although non-policymaking positions often have less or limited responsibilities associated with them, that is not to say that a position associated with a greater number of responsibilities is necessarily a policymaking position. The Court used the position of an employee supervisor as an example. Although this position often entails a greater number of responsibilities, these responsibilities "may have only limited and well-defined objectives." *Elrod,* 427 U.S. at 368. Such a position would not be a policymaking position. Conversely, policymaking positions come with responsibilities that are generally broader in scope, and not as well-defined. *Id.* Moreover, the relevant inquiry focuses on "the function of the public office in question and not the actual past duties of the particular employee involved." *Brown v. Trench,* 787 F.2d 167-68 (3d Cir. 1986). The burden rests on the hiring authority to prove "that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti,* 445 U.S. at 518; *see also Elrod,* 427 U.S. at 368.

The Third Circuit discussed the legal framework employed in political discrimination cases in *Stephens v. Kerrigan*, 122 F.3d 171 (3d Cir. 1997). A burden shifting mechanism is used. Such mechanism is similar, though not identical, to the one used in other employment discrimination cases, such as Title VII cases. *Id.* at 176. In order to make a prima facie case, plaintiffs must show "that they worked for a public agency in a position that does not require a political affiliation, that they were engaged in constitutionally protected conduct, and that the conduct was a substantial or motivating factor in the government's employment decision." *Id.* at 176; *see also Robertson v. Fiore*, 62 F.3d 596, 599 (3d Cir. 1995); *Laskaris v. Thornburgh*, 733 F.2d 260, 264-65 (3d Cir. 1984), *cert. denied*, 469 U.S. 886 (1984). After an employee makes this demonstration, the burden

shifts to the employer to prove by a preponderance of the evidence that the same employment decision would have been made "even in the absence of the protected activity." *Stephens*, 122 F.3d at 176.

a. Substantial or Motivating Factor in the Government's Employment Decision

Defendant argues that Plaintiffs failed to satisfy this prong of the inquiry because they failed to adduce any evidence demonstrating that Commissioner Levin had any knowledge of Plaintiffs' political affiliation. The Third Circuit has stated that an implicit requirement in proving that political affiliation was a substantial or motivating factor is to show that the employer had knowledge of plaintiff's political affiliation. *Laskaris*, 733 F.2d at 265. Defendant cites two cases from this circuit, *Stephens v. Kerrigan*, 122 F.3d 171 (3d Cir. 1997), and *Laskaris v. Thornburgh*, 733 F.2d 260 (3d Cir. 1984), in support of its proposition that knowledge is a requirement in political discrimination cases. Both cases will be discussed in turn as they provide helpful guidance in analyzing this particular issue.

In *Stephens,* the Third Circuit reversed the district court's grant of summary judgment in favor of the government official – in this case the mayor of the City of Allentown, Mayor Heydt. 122 F.3d 171. Relying on statements made by Heydt in his sworn affidavit and deposition testimony, the district court found that plaintiffs did not produce sufficient evidence to establish knowledge of the plaintiffs' political affiliation. Plaintiffs argued that a reasonable inference could be made because their political affiliations were well-known among their co-workers, including those who supported Heydt. The district court refrained from drawing any inferences in favor of the plaintiffs

based on its reading of *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578 (3d Cir. 1996) – which the court said stood for the proposition that a jury may not infer such knowledge. Stephens, 122 F.3d at 177. The Third Circuit disagreed with this reasoning.

The circuit court found that inferences may be made. Sufficient evidence was set forth by plaintiffs to show that Heydt had the requisite knowledge. This included circumstantial evidence that showed that "there was an information 'pipeline' between Heydt and his . . . supporters." *Stephens*, 122 F.3d at 178. The circuit court found that Heydt had continuing contact with members of the department regarding personnel and management issues. Similar to the present case, there was evidence supporting the allegation that Heydt requested a "master" reorganization plan be created by the department leadership after his election. Accordingly, the circuit court concluded that the grant of summary judgment could not be sustained.

In the case of *Laskaris*, however, the Third Circuit upheld a judgment following a bench trial in favor of the government official, the Pennsylvania Department of Transportation ("DOT"). In that case, the circuit court agreed with the district court's finding that the two plaintiffs failed to prove that the DOT had any knowledge they were Democrats. In support of their claims, Plaintiffs submitted a letter from a state representative suggesting that the "incompetent political hacks" be terminated. *Laskaris*, 733 F.2d at 265. Plaintiffs did not produce any evidence, however, showing that any managers responded to the letter by firing plaintiffs. Nor did plaintiffs show that their particular positions, out of a total of 15,000 positions in the agency, were specifically targeted. Plaintiffs also failed to prove that the discharge decision was politically motivated. In upholding the judgment, the Third Circuit stated that "while the evidence has about it a vague aura of politically motivated patronage firings . . . it is far too insubstantial to show that the individual plaintiffs here

were discharged because of their political affiliation." *Id.* at 266.

In the case at bar, Plaintiffs contend that Levin undoubtedly knew Plaintiffs' political affiliation based on a list that she allegedly requested shortly before the terminations began. Savas and Bowser testified in their depositions that they were asked by the Chief Operating Officer, Denise Coyle, to assist her in preparing a list of the executive staff for the Commissioner. The list allegedly included various personnel information, as well as the political affiliations of the listed employees.[3] Sweetser Cert., Ex. O at 133. According to Savas and Bowser, political party information was specifically requested and both were instructed to indicate whether the employee was a "D" or an "R." These determinations were made based on personal knowledge and by referring to the employee's date of hire and referral lists.

Plaintiffs further assert that the Commissioner had knowledge of political affiliations based on a second list that was requested. Plaintiffs state that Coyle was requested to prepare a list of employees who were hired between the years of 1994 to 2002 – a time during which Republican Governors were in office. Coyle submits that the information was requested by the Executive Director DeSantis on behalf of the Commissioner and directly by the Authorities Unit's liaison to the NJHMFA, Michael Henneberg. Sweetser Cert., Ex. V. at 70-71, 77-80.

Defendant counters this argument with Levin's sworn statement and deposition testimony that she was not aware of any of Plaintiffs' political affiliations. Defendant asserts that Levin denies asking for the list to be prepared. Calao Cert. Ex. C, at 85. NJHMFA also argues that Coyle denies ever having discussed political affiliations of Agency employees with Savas and Bowser. Calao

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[3] According to Savas, the information that was collected included: name, range, title, date of hire, underlying status in Civil Service if applicable, and political affiliation. Sweetser Cert., Ex. O, at 133.

Supp. Cert., Ex. 11 at 87.

Based on the evidence contained in the record, this Court concludes that a genuine issue of material fact exists as to whether Commissioner Levin had knowledge of the Plaintiffs' party affiliation.

With regard to whether political affiliation was a substantial or motivating factor in the dismissals, the burden of proof rests on the Plaintiffs. The crux of Plaintiffs argument is that the reorganization was merely a pretext for the new Administration to make room for its political patrons in the Agency. To support this argument, Plaintiffs make several points. As a result of the reorganization, twenty-six employees were terminated and at least fourteen position were eliminated. Plaintiffs contend that of the twenty-six employees who were terminated, twenty-three were either identified as Republicans or hired during the previous Republican administrations. Pls.' Opp'n at 8, 24. Additionally, they assert that when Commissioner Levin was asked why Plaintiffs were not offered to transfer to other positions rather than be terminated, despite the fact that NJHFMA retains a policy of promoting from within the Agency, Levin answered that the goal was not to fill vacancies but "to reduce the number of positions." Sweetser Cert, Ex. W, P at 63.

However, Plaintiffs argue that the facts suggest otherwise. As a result of the reorganization, the record indicates that at least fifteen new positions were created. Sweetser Cert., Ex. A at 10-11; Pls.' Opp'n at 9. In some instances, they argue that an eliminated position bears striking resemblance to a newly created position. For example, six months after Petrino's position of Chief Information Officer was eliminated, the position of Director of Information Technology was created.

Furthermore, thirty-eight full-time employees were hired during the reorganization, specifically between March 2002 and March 2003. Plaintiffs contend that these facts do not comport

with Defendant's assertions that the main goal of the reorganization was to "cut costs and streamline operations." Def.'s Reply at 14. The Human Resources Coordinator, Dolores Guinan, stated that she was instructed to screen a group of approximately seventy-five resumes that came from NJHMFA's executive area shortly after the terminations. Sweetser Cert., Ex. Y. She was told to call the applicants and determine their interest in any positions at NJHMFA. Plaintiffs argue that the temporal proximity between when the terminations and this event occurred, as well as the instructions themselves, belie Levin's purported claims that the objective of the reorganization was to cut costs and reduce the number of positions. Plaintiffs also offer evidence that of the thirty-eight new employees, twenty-five were either affiliated with the Democratic Party or were directly referred by Democrats, including but not limited to members of the Governor's Office.

Defendant responds by asserting that the terminations were the result of an Agency-wide reorganization. Commissioner Levin explained that upon assuming position of Commissioner, one of her immediate goals was to restructure the functioning of NJHMFA so that it could run more efficiently. In doing so, more affordable housing could be made available in New Jersey. Over the course of a few months in early 2002, Levin participated in a fact-gathering process. She spoke with numerous individuals and organizations to determine areas of the Agency that needed improvement. Levin, the final decision-maker with regard to terminations, compiled a list of employees that she intended to fire. She later consulted with members of the Executive Board to determine which names should be removed.

Defendant asserts that the evidence is undisputed that the terminations were the result of the reorganization. However, the only evidence supporting these assertions is deposition testimony from Commissioner Levin and other individuals who may have been involved in discussions with her,

including Battis, Closkey, and Hawes. The Court has not been presented with any documentation describing the need for reorganization, or the process by which decisions were made.[4] Rather, the record indicates complete discretion on the part of Commissioner Levin with respect to the people she chose to hire and the positions that were to be eliminated, and an issue of material fact as to whether she asked for and reviewed information on political affiliation.

In summary, this Court concludes that Plaintiffs have set forth sufficient evidence to raise a dispute of material fact whether political affiliation was a substantial or motivating factor. This Court further concludes that there is also a dispute of material fact whether the same employment decision would have been made even in the absence of the constitutionally protected activity. Mindful that all facts and inferences must be construed in a light most favorable to the Plaintiffs, the Court finds that a genuine issue of material fact exists as to whether political affiliation was a substantial or motivating factor in the government's decision to discharge the employees.

b. Engaged in Constitutionally Protected Conduct

One of Defendant's main arguments in support of its summary judgment motion is that four of the six Plaintiffs did not engage in constitutionally protected activity during the course of their employment at NJHMFA. In particular, Defendant asserts that Ali, Savas, Korte and Petrino testified that they did not actively participate in partisan political activities. They did not "attend

[4] The record contains one document from Commissioner Levin to the Chief of Management of the Governor's Office, Jim Davy. Sweetser Cert., Ex. C, JJ. The memorandum dated April 19, 2002 states Levin's intention to request letters of resignation from twenty-six employees. Levin indicated that the department was to be restructured in order to streamline the operations, with a "plan to follow." *Id.* Some names were designated as immediate terminations. But no explanation was given as to how or why these employees were selected.

political fundraisers, work on campaigns, make campaign contributions, attend political rallies, or have political memorabilia in their office or vehicles." Def.'s Br. at 16. Defendant notes that Savas is not registered to vote with any political party. Defendant further asserts that Ali admitted that she does not affiliate with either political party although she is currently registered as a Democrat, and that she was ineligible to vote in New Jersey because she is a Pennsylvania resident.

At oral argument, Defendant asserted that Plaintiffs are required to show some degree of political activity in order to sustain a political discrimination claim. However, the Third Circuit has clearly articulated that "[a] citizen's right not to support a candidate is every bit as protected as his right to support one." *Bennis v. Gable*, 823 F.2d 723, 731 (3d Cir. 1987). Thus, Defendant's argument that Plaintiffs did not engage in constitutionally protected activity because they were not politically active must fail.

NJHMFA could be found liable if it took adverse employment actions in order to make room for its political supporters. *Id.* at 732; *see also Conjour v. Whitehall Township*, 850 F. Supp. 309, 317 (E.D. Pa. 1994) (noting the fact that an employee was not politically active is not dispositive of his First Amendment claim). The Third Circuit further clarified that the constitutional right to political affiliation protects employees whether they belong to the same political party as their employer or not. *Robertson*, 62 F.3d at 600-01.

c. Policymaking vs. Non-policymaking Positions

Defendant argues in the alternative that Plaintiffs Ali, Savas, and Petrino held positions that were policymaking or advisory, and thus political affiliation could be required. This Court will discuss each position in turn.

Ali was employed in the Government Affairs and Community Outreach Department and held the position of Community Outreach Coordinator. The NJHMFA Job Description for this position is summarized as follows:

> Under the supervision of the Director of Government Affairs & Community Outreach, assist in the design and implementation of strategies to increase participation in housing programs; market such housing programs State-wide through trade shows and conferences; perform related duties as required.

Calao Cert., Ex. R. Relying on Ali's resume, testimony, and the position's job description, Defendant describes Ali's position as one that involves creating and implementing NJHMFA's housing policies by working with government officials. Such a position, Defendant argues, is one that can require political affiliation.

Ali states that she was largely responsible for all external affairs relating to NJHMFA's housing programs. Calao Cert., Ex. L. at 17. Ali admits to working regularly with "municipal leaders, state officials and legislators . . . as a representative of [NJ]HMFA." *Id.* at 20-21. However, Ali further asserts that the true nature of her job was to assist the Agency's Director of Government Affairs and Community Outreach, Chris Simon, with setting up conferences or housing fairs. Certifications of Ali ("Ali Cert."). Ali admits to working with developers, government officials, church groups and other organizations, but merely to explore any interest in holding a housing fair or to discuss logistics. *Id.* Moreover, Ali asserts that she met with them solely as Simon's assistant and was not permitted to take any action on behalf NJHMFA without express permission of Simon. *Id.* Ali submits that she did not provide any input to NJHMFA's policies or budgetary matters. Ali was also involved in marketing and promoting NJHMFA's programs, but was not responsible for writing speeches or press releases.

Savas was employed in the Human Resources Department of NJHMFA as Director of Human Resources. The NJHMFA Job Description for this position is summarized as follows:

> Under supervision of the Chief Operating Officer, plan, coordinate and direct the activities of Human Resources; formulate policies relating to Human Resources administration; conduct programs concerning employee recruitment, selection, training, development, retention, promotion, benefits and compensation; ensure HMFA compliance with applicable federal and local laws . . . direct staff in the daily performance of job duties. Conduct and analyze research for special projects as directed by Executive staff; perform related duties as required.

Calao Cert., Ex. O.

Defendant cites *Duriex-Gauthier v. Lopez-Nieves*, 274 F.3d 4 (1st Cir. 2001) to support its proposition that political affiliation is an appropriate requirement for the Director of Human Resources position. In *Duriex-Gauthier*, the First Circuit found that the position of Personnel and General Services Officer in the Ombudsman's Office of Puerto Rico was a position for which political affiliation is an appropriate requirement. The court noted that the duties of the Ombudsman's Office, which was created by statute in Puerto Rico, involve "investigat[ing] the administrative acts of the agencies and conduct[ing] investigations of citizens' claims." *Id.* at 6. Upon completing an investigation, the Ombudsman has the authority to recommend a remedy – including recommendations to set aside or alter an administrative act, modify the law or regulation on which the administrative act is based, or advise the agency to perform another action. *Id.* The Ombudsman is appointed by the Governor, and the Personnel Director is considered to be a "trust" employee. The term "trust" is defined within the civil service law of Puerto Rico as "those who intervene or collaborate substantially in the formulation of the public policy, who advise directly or render direct services to the head of the agency." *Id.* at 7-8. Moreover, "trust" employees were

subject to free removal. *Id.* at 6.

This Court disagrees with Defendant's characterization of Savas' position as one that is "no different than the Personnel Director in *Duriex-Gauthier*." Def.'s Br. at 30. As an initial matter, the statutorily-created Office of the Ombudsman and the NJHMFA differ greatly in its mission and goals. As an adjunct to the Puerto Rican Legislature, the employees of the Ombudsman Office had the general responsibility of investigating and addressing citizens' claims. *Duriex-Gauthier,* 274 F.3d at 6. It follows that certain employees of the Ombudsman's Office, including the Personnel Director, were considered "trust" employees. The Director of Human Resources at the NJHMFA, however, is not a "trust" employee. Although both positions may share similar duties and responsibilities, there is no inherent attribute of trust or confidence associated with Savas' position that would render her position subject to political removal as Defendant suggests.

Focusing on the duties of the Director Human Resources, Savas was responsible for conducting programs related to typical Human Resource concerns, including "recruitment, selection, training and development, retention, promotion, benefits and compensation." Calao Cert., Ex. O. It is clear that the position greatly involved the formulation of policies – but appears to be limited to policies "relating to Human Resources administration and equal employment opportunities." *Id.* Further, Savas submits that the extent of her policymaking involved "drafting new or amended human resources policies" and "massag[ing] old policies using DCA policies such as the dress code and sexual harassment policies." Certification of Savas at 2. Such narrow objectives are indicative of a non-policymaking position.

Petrino held the position of Chief Information Officer as part of the Information Technology ("IT") Department. The NJHMFA Job Description for this position is summarized as follows:

> Under supervision of the Chief Operating Officer, the Chief Information Officer is responsible for the overall operational management and administration of the Information Technology (IT) Program which defines policies, processes, requirements, and standards governing the planning, acquisition, management, security and utilization of the Information Technology System; strategic planning with regard to Information Technology, and implementation of strategies to accomplish the HMFA's IT goals; upgrading and integrating the existing network and systems; serve as technology advisor to Senior Executive Staff; and perform related duties as required.

Calao Cert., Ex. T. In support of its position that Petrino held a policymaking decision, Defendant notes that Petrino was the "Executive Officer responsible for all Systems and Technology for a 250-person quasi-public state agency," received one of the highest salaries at NJHMFA, and reported directly to the second highest official at the Agency. Def.'s Br. at 31.

Nonetheless, the record indicates that Petrino's position was very technical in nature. His main responsibility involved ensuring the smooth operation of technical data processing at the Agency. Certification of Petrino at 1. Petrino asserts that the extent of his policymaking related to e-mail and internet policies. Petrino did not meet with government officials to discuss the Agency's policies. Occasionally, however, Petrino would meet with government officials if an IT issue arose. Petrino's position also required him to associate with various departments of the Agency to discuss technical, software of system matters. Such characteristics suggest that the position of Chief Information Officer of NJHMFA had limited, well-defined responsibilities representative of a non-policymaking position. Although Petrino may have had numerous responsibilities relating to the determination and implementation of the Agency's IT goals, the position appears to be more technical, rather than policymaking or advisory, in nature.

Viewing the facts and inferences in the light most favorable to the Plaintiffs, the non-moving

party, this Court concludes that Defendant failed to satisfy its burden in demonstrating that Ali, Savas, and Petrino held positions that require political party affiliation for effective performance. Therefore, summary judgment is denied as to this issue.

In sum, this Court concludes that drawing all inferences in favor of the non-moving parties, there is a dispute of material fact whether Plaintiffs were discharged based on their political affiliation. Accordingly, Defendant's motion for summary judgment dismissing the remaining claim in Plaintiffs' Complaint must be denied.

B. Plaintiffs' Motion to Appeal Magistrate Judge Hughes' June 22, 2004 Order

A district court may reverse a magistrate judge's determination of a non-dispositive issue only if it is "clearly erroneous or contrary to law."[5] 28 U.S.C. § 636(b)(1)(A); *see also* FED. R. CIV. P. 72(a); L.CIV.R. 72.1(c)(1); *see also, Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1113 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 177 F.R.D. 205, 213-14 (D.N.J. 1997). A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Lo Bosco v. Kure Eng'g Ltd.*, 891 F. Supp. 1035, 1037 (D.N.J. 1995) (quoting *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also South Seas Catamaran, Inc. v. Motor Vessel Leeway*, 120 F.R.D. 17, 21 (D.N.J. 1988). A district court may not take into consideration any evidence that was not put forth before the magistrate judge when reviewing the magistrate judge's factual determination. *Haines v. Liggett Group, Inc.*, 975 F.2d 81,

[5] A party objecting to a magistrate judge's order may, within ten days of service of the order, serve and file objections with the district judge. FED. R. CIV. P. 72(a); L. Civ. R. 72.1(c)(1)(A).

92 (3d Cir. 1992); *Lithuanian Commerce*, 177 F.R.D. at 213.

Under the clearly erroneous standard , the reviewing court will not reverse the magistrate judge's determination even if the court might have decided the matter differently. *Cardona v. Gen. Motors Corp.*, 942 F. Supp. 968, 971 (D.N.J. 1996) (quoting *Toth v. Alice Pearl, Inc.*, 158 F.R.D. 47, 50 (D.N.J. 1994). The court, however, will review a magistrate judge's legal conclusions under de novo review. *Cooper Hosp./Univ. Med. Ctr. v. Sullivan*, 183 F.R.D. 119, 127 (D.N.J. 1998) (citations omitted).

"Where a magistrate judge is authorized to exercise his or her discretion, the decision will be reversed only for an abuse of that discretion." *Id.*; *see also* 12 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3069 (2d 1997) ("many matters such as discovery scheduling or disputes might better be characterized as suitable for an abuse-of-discretion analysis"). The deferential standard of review is particularly appropriate in the case where the Magistrate Judge managed the case from the outset, and thus has a thorough knowledge of the proceedings. *Cooper Hosp.*, 183 F.R.D. at 127 (quoting *Public Interest Research Group v. Hercules, Inc.*, 830 F. Supp. 1525, 1547 (D.N.J. 1993), *aff'd on other grounds and rev'd on other grounds*, 50 F.3d 1239 (3d Cir. 1995)).

In the present case, Plaintiffs appeal Magistrate Judge Hughes' June 22, 2004 Order denying their motion to compel discovery of two documents. Plaintiffs sought a resume folder containing the seventy-five resumes reviewed by Dolores Guinan, along with twenty referral notes that Plaintiffs allege are contained in the folder. The second document is entitled "Applicant Status Report." Plaintiffs received a redacted copy and now seeks it in unredacted form. Plaintiffs posit that these documents show "preferential treatment in the hiring process for political referrals of the new

administration." Pls.' Appeal Br. at 10. Defendant notes, however, in its written submissions and at oral argument that the information Plaintiffs seek relate to applicants who were neither hired nor offered a position at NJHMFA.

Judge Hughes denied Plaintiffs' motion to compel based on two limiting provisions of Federal Rules of Civil Procedure, namely Rule 26(b)(2)(iii) which limits discovery if "the burden or expense of the proposed discovery outweighs its likely benefit" and Rule 26(c) which seeks "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." FED. R. CIV. P. 26(b)(2)(iii), 26(c). This Court agrees with the decision of the Magistrate Judge. Contrary to Plaintiffs' argument, the information sought is of minimal relevance to the Plaintiffs' claims. First, as Defendant emphasized at oral argument, only six of the seventy-five applicants were hired by NJHFMA. This fact alone belies the argument that the applicants were given some degree of special treatment. Secondly, personal information concerning applicants who were not either offered a job not hired for a position at NJHMFA bears minimal relevance to the issue of whether the terminations were politically motivated. There is no guarantee that information contained within the resumes themselves would reveal information regarding political affiliation. Plaintiffs would have to ask the factfinder to draw inference upon inference whether the nonexistence of an offer of employment for any one applicant was demonstrative of impermissible terminations based on political affiliation. Numerous reasons can exist as to why these individuals were not offered positions. Such a minimal degree of relevance is greatly outweighed by the invasion of privacy that would result should this information be disclosed.

Accordingly, this Court concludes that the magistrate judge's decision to deny Plaintiffs' motion to compel was not clearly erroneous or contrary to law. Judge Hughes' Order of June 22, 2004 is therefore affirmed.

III. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is denied and the ruling of the Magistrate Judge is affirmed. An appropriate Order accompanies this Memorandum Opinion.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.